No. 11858

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

OPENING BRIEF OF APPELLANT FRED HARVEY, A CORPORATION.

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All references are to pages of the transcript of record.

This is an appeal from a judgment rendered upon the second trial of this case. On the first trial the Court granted the defendant's motion to dismiss but its action in so doing was reversed on appeal (*Mateas v. Harvey,* 146 F. (2d) 989). Upon this second trial the jury rendered a verdict in favor of the plaintiff upon which judgment was entered.

I.

Jurisdiction.

The jurisdiction of the District Court was based upon diversity of citizenship (28 U. S. C. A., Sec. 41) and the Circuit Court of Appeals has jurisdiction to review the judgment rendered by said District Court. (28 U. S. C. A., Sec. 225.)

II.
Pleadings and Record.

The amended complaint alleges in substance [11-17] that the appellant, a New Jersey corporation, maintained a resort on the south rim of the Grand Canyon in Arizona; that it maintained two trails from said rim to its base, known respectively as the Phantom Ranch and Bright Angel trails; that it also maintained mules for the purpose of carrying passengers on the Bright Angel trail; that appellee bought and paid for a ticket for this excursion down the Bright Angel trail, informing the appellant at that time that he had never ridden a mule; that appellee, on or about June 27th, 1942, started on the excursion on mule back as a member of a party of seven; that appellee was assigned to a mule known as "Chiggers," with the position of last in a line of seven mules; that appellee did not know the previous history of that mule; that this was the first time this mule "Chiggers" had been up or down the Bright Angel trail since the previous winter.

The complaint further alleged that on the ride down the canyon his mule tried several times to squeeze past the mule in front of him on the outside of the trail; that appellee was not able to control him; that an employee of appellant had instructed appellee to hold the reins in his hand at all times, which appellee did, although the other riders did not do so; that several miles down the canyon appellee exchanged mules with an experienced rider and told appellant's employee, the guide, that appellee could

not hold the mule; that the guide required appellee to remount the same mule and proceed upon him; that the mule continued to try to pass other mules, and in about an hour started bucking and threw appellee to the ground.

The rest of the complaint alleged appellee's injuries and damages.

The answer to the second amended complaint, erroneously termed "answer to amended complaint" [17-22], admitted that appellant, a corporation, maintained the resort, but denied the remainder of the foregoing allegations. It pleaded as affirmative defenses that the accident referred to was inevitable and unavoidable in so far as appellant was concerned, and that appellee had voluntarily assumed any risk incident to riding the mule.

The case went to trial before a jury. During the course of the trial witnesses were permitted, over objection, to testify as to conversations between appellee and a Mr. Boles, which conversations were not within the hearing of any employee of appellant [122, 160-161].

The Court, at the conclusion of the evidence, instructed the jury that the appellee assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip, but that he did not assume any risk which was proximately caused by the failure of the appellant, either before or at the time of the accident, to exercise ordinary care under the circumstances [300].

The jury rendered a verdict for appellee in the sum of $7500.00, upon which judgment was entered for appellee [45, 46-47].

III.

Statement of Facts.

Appellant concedes there is sufficient evidence to support findings of the following facts.

That appellant maintained the resort; that it advertised excursions down Bright Angel trail on faithful, sure-footed mules in charge of an experienced guide; that appellee informed appellant he had never previously ridden a mule; that appellant informed him that most of the people who made the trip were inexperienced riders; that appellee bought and paid for tickets for himself and wife for the excursion; that appellee was assigned a mule named "Chiggers"; that he started down the trail on the mule as the seventh in a line or string of seven mules led by the guide; that "Chiggers" had spent the preceding winter mostly in pasture; that this was his first trip up or down the trail since the winter; and that on the trip "Chiggers" bucked, throwing appellee to the ground and injuring him.

The appellee testified he went to the corral at the head of the trail [108]; that the trail master, Mr. Bradley, told him to take a particular mule [110-113] and to hold the reins in his hand [111, 117]; that the order of the excursion from front to rear was the guide named Bob Ennis, Mrs. Rayles, Mrs. Boles, Mrs. Mateas, appellee's wife, Mrs. Vogel, Mr. Boles and the appellee [113-114]. The trip was conducted at a walk, but appellee's mule would break into a trot or faster than a walk and try to squeeze past the other mules [127]. On the down trail Mr. Boles would grab appellee's mule by the halter or head strap and hold him back [118]. At Indian Gardens everybody dismounted for lunch and remained there about an hour [118].

Over objection, appellee testified that on the way down to Indian Gardens he and Mr. Boles spoke several times [120-121]; that Mr. Boles asked him if he had ever ridden before and appellee told him no, he had ridden burros when he was a child and nothing since them. That appellee asked Mr. Boles if he was an experienced rider; that Mr. Boles said he was practically born on a mule; that appellee told Mr. Boles he would like to get off his mule, but wouldn't expect Mr. Boles to change with him; that Mr. Boles assured him that he could handle most anything [122].

That appellee and Mr. Boles did change mules; that Bob Ennis, the guide, came along and told appellee he was on the wrong mule [119]; that appellee told Ennis he realized that; that he was afraid he couldn't handle the mule which was kind of frisky; that he wasn't an experienced rider; that Mr. Boles had offered to trade with him because he couldn't handle the mule; that Boles told the guide that appellee had a skittish mule and that his mule was perfectly safe so that he preferred to exchange with appellee, but that the guide insisted that they keep the mules they started with [122-123, 134].

Appellee's attention was called to his deposition which had been previously taken. At one place therein he testified that neither he nor Mr. Boles had said anything to the guide at Indian Gardens [131], though at other places in the deposition he testified that he had told the guide that he would like to change with Mr. Boles and that he may have mentioned that he was afraid he couldn't handle the mule because the mule was frisky and he wasn't an experienced rider [133-134].

His attention was also called to a signed statement given by him at the hospital a week or two after the accident. At this time he had recovered sufficiently to be starting to get up and to use a wheel chair, though he was still in pain [149-150]. The statement was read to him before he signed it. It reads in part:

> "However, the guide noticed that the stirrups were too long and then asked us to change mules. I did not say anything to the guide that I would like to ride this mule, and I do not know if the other man said anything to the guide. I was on the mule that the man ahead of me had been riding. However, the guide noticed the change and asked us to change to the mules that we had started out with. The rider of the other mule suggested that I stay on his mule after we had made the change, because of his experience in riding."

Appellant testified that this written statement was correct except in two particulars, one of which was in stating that there was no conversation with the guide [137-140].

He then testified that he and Mr. Boles changed back to their original mules [123]; that after leaving Indian Gardens up to the time of the accident he had no trouble with the mule; that the mule did not buck before the accident [126-129; 146-147]; that it was down hill all the way and the mules were kind of stringing out becoming further apart; that the line was getting longer; that the guide stopped his mule to allow the other mules to catch up; that they all did so and that Mr. Boles' mule stopped at a kind of ditch; that Mr. Boles kicked him in the ribs; that he started up fast to keep up with the string and that appellee's mule started up fast right behind him; that when

Mr. Boles' mule reached the end of the line he stopped as did appellee's mule, which then started bucking and continued bucking until it threw appellee over the mule's head to the ground; that this occurred about one-half to one hour after leaving Indian Gardens [123-124].

Mrs. Vogel testified that it seemed to her that the mule had bucked before they got down to Indian Gardens because it had created a commotion at least a dozen times 153]. Over objection she was also allowed to testify as to conversations which she heard between Mr. Mateas and Mr. Boles out of the hearing of the guide [156-159]. She testified that Mr. Boles said "What is the matter with that ornery mule. Does he have a bee in his bonnet?"; that Mr. Boles and appellee laughed about it and that frequently Mr. Boles tried to give appellee advice about how to handle the mule and that Mr. Boles said that maybe it would be better for appellee to get off and lead the mule [160-161].

Mrs. Mateas corroborated much of her husband's testimony [169 *et seq.*]. She also testified that when the statement was read over to appellee, the part about there having been no conversation with the guide was not read [190]; that the remainder of the statement was what appellee had told the investigator [195] and that after the statement was read to him, it was handed to appellee [196].

Mrs. Rayles testified that she heard a conversation at Indian Gardens in which appellee told the guide that the mule he rode bothered him and that he wanted to change mules with Mr. Boles, but that the guide told them that they should continue on with the mules that they originally had [202-203].

Will Wilson, a witness for the appellant, testified he was a guide on the Bright Angel trail in 1940, 1941 and 1942 and knew the mule "Chiggers" well [177]; that Chiggers was used in various positions in the string of mules wherever he happened to come, though he was more often used as a guide mule [178-179]; that they never had any trouble with "Chiggers" who was very much of a pet [179]; that it was the custom to instruct all riders to hold the reins of their mules [181-182]; that from a lead position one cannot hear conversations taking place two mules towards the rear [182-183].

John D. Bradley, witness for the appellant, testified he was the trail foreman in charge of the riding and packing animals since 1936 and his life work had been with animals, including mules [207-208]. He then described the training "Chiggers" had received [208-212].

"Chiggers" had no particular place in a string of mules [220]. It was standard practice to tell people to hold the reins, they being told to hold them in any way comfortable to themselves so long as they did not pull on the animal's mouth [224-225, 232]. There was no inflexible rule against changing mules [230]. They never had any trouble on the first trip of a mule after being out for pasture during the preceding winter [233-234].

C. Yarberry, a witness for the appellant, also testified as to the training given the mules [236-237]. He testified that he named "Chiggers" after a pet horse he had had in Texas because "Chiggers" was so gentle [236].

Robert Ennis, a witness for appellant, testified that there were four things he told the excursionist to do: Always to hold the reins; always to keep their feet in

the stirrups; to try and keep their mules as close to each other as they could; and not to get off and on their mules unless he was there to help them. That a good half of the time that they were on the trail he was turning back so that he could see the party and that when he was not doing that he was generally on a switch back where they are right in front of him as they are coming down. Consequently, he practically always was able to see them [242-243]; that he observed nothing unusual about "Chiggers" up to Indian Gardens and received no complaints [242-243]; that he was not informed at Indian Gardens or anywhere in that vicinity that there had been any trouble with "Chiggers" [244-245]; that he doesn't remember if anyone moved on a different mule before leaving Indian Gardens as that often happens [245]; that he noticed nothing unusual after leaving Indian Gardens [246], but that the mules do stay just as close together as they can, and that some will put their heads right up behind the other mules' rear ends and sometimes walk along in that fashion [246]; that he saw appellee fall off and that appellee was in the air as if he were making a dive over the mule's head. He did not observe the mule at this time [247].

Over the objection of appellants [287-292], the Court instructed the jury as follows [300]:

> "The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have know, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

IV.

Burden of Proof on Appellee.

The owner of a horse or mule hiring the same to another is not an insurer. The burden of proof is upon a plaintiff to prove that the mule was vicious and unsuitable for the purpose for which it was hired, and further, he is required to prove that the defendant knew, or by the exercise of reasonable care should have known, that fact.

Dam v. Lake, 6 Cal. (2d) 395, 57 P. (2d) 1315;

Kersten v. Young, 52 Cal. App. (2d) 1, 125 P. (2d) 501;

Heath v. Fruzia, 50 Cal. App. (2d) 598, 123 P (2d) 560.

V.

Prejudicial Error in the Admission of Evidence.

The witnesses for the appellant testified at length as to the thorough training which was given the mules before they were allowed to carry excursionists down the trail. They testified that the particular mule "Chiggers" had received this training and was an especially gentle animal. There was absolutely no evidence as to any previous conduct upon the part of "Chiggers" indicating that he was unfit for the purpose of carrying excursionists.

The evidence, however, established that some time after leaving Indian Gardens "Chiggers" did buck and threw appellee to the ground.

Two main questions of fact are involved in this case: Was "Chiggers" unfit for the purpose for which he was being used and, if so, did or should appellant have known of this fact?

The only evidence in support of appellee's case is that dealing with the conduct of "Chiggers" on this particular trip prior to the time of the accident.

It was a close question as to whether this evidence was sufficient to support findings in favor of appellee on these two points. On the previous trial, with substantially similar evidence, the learned trial court felt the evidence was as a matter of law insufficient. On appeal this Court reached the contrary conclusion. One Justice, however, was of the opinion that since the case was tried before a court without a jury, the decision of the trial court should have been affirmed. (*Mateas v. Harvey,* 146 F. (2d) 989, 993-994.) The least that can be said is that the evidence would have supported a verdict and judgment for appellant.

It is, therefore, readily seen that any evidence as to how the mule acted from the time appellee got on it at the corral is extremely important, and any error committed in connection with the admission of such evidence would necessarily be highly prejudicial.

Appellee himself and Mrs. Vogel were each permitted to testify as to conversations which are claimed to have taken place between appellee and Mr. Boles, another excursionist, between the start of the trip and the arrival at Indian Gardens.

Thus appellee was allowed to testify, over objection of the appellant, as follows [121-122]:

> "A. Well, he asked me if I had ever ridden before. I told him no; I had ridden burros when I was a child and nothing since then. I asked him if he was an experienced rider. He said he was practically born on a mule; he had been on a mule since he was

two years old, had been in pack trains, most everything.

This was not at one particular time. It was a little bit at particular different intervals. He offered to trade mules with me. I told him I would like to get off the mule I had but I wouldn't expect him to change with my mule. He assured me he could handle most anything. That was on the way down to Indian Gardens."

Later Mrs. Vogel was allowed to testify, again, over the objection of appellant as follows [156-162]:

"A. Well, it started at the top of the trail and Mr. Boles, one of the first things I remember was that Mr. Boles said, 'What is the matter with that ornery mule? Does he have a bee in his bonnet?'

The Court: 'Said that to whom?'

The Witness: 'He to Mr. Mateas. And I could hear everything he said, because I was in front of him.'

Q. (By Mr. Lincoln): 'Did Mr. Mateas say anything to that?' A. Oh, they just laughed about it. And then frequently Mr. Boles tried to give him advice about how to handle the mule. Mr. Boles is head of the Sierra Pack Train in the Sierras.'

. . . . . .

A. Yes. I can't remember the exact conversations that took place, but I know, for one thing, they talked about maybe it would be better for him to get off and lead the mule.'

. . . . . .

The Witness: 'Well, they kept kind of kidding him about the mule and—I don't know.' "

There is no evidence that these conversations were within the hearing of the guide who was the only employee of appellant with the party. On the other hand, there is testimony that from the position of the guide at the head of the line he could not have heard what was said between the riders of the two mules last in the line [182-183].

These conversations were pure hearsay as far as appellant is concerned. In so far as they related what was said by appellee, they were also self-serving declarations.

The rule against the admission of hearsay evidence is not a mere technical rule of evidence, but is based on public interest and to avoid the inherent weakness of such evidence.

> *Englebritson v. I. A. C.,* 170 Cal. 793, 797-799, 151 Pac. 421.

The rule prohibiting the admission of self-serving declarations and of evidence of conversations outside the presence of the party against whom such evidence is offered is established by a long line of cases, of which we will cite the Court to the following:

> *Turner v. Turner,* 187 Cal. 632, 637-638, 203 Pac. 109;
>
> *Schultz v. McLean,* 76 Cal. 608, 609, 18 Pac. 775;
>
> *Chapman v. Neary,* 115 Cal. 79, 83, 46 Pac. 867;
>
> *Ambrose v. Hyde,* 145 Cal. 555, 558-559, 79 Pac. 64;
>
> *Coulter Dry Goods v. Manford,* 38 Cal. App. 231, 234, 175 Pac. 900;
>
> *Bituminized B. & T. Co. v. Simons Brick Co.,* 183 Cal. 687, 695-696, 192 Pac. 528.

It is true that the Court received the evidence as to these conversations to show what was said, but not as proof of the truth of what was said [121, 158]. We confess that we are at a loss to understand the ruling of the Court. What is the materiality of what was said unless the saying thereof tended to prove its truth? If the mule had been acting up during the trip, it made no difference whether or not appellee had complained to any other excursionist or whether or not any other excursionist had offered to exchange mules. If the mule was unfit to carry excursionists, recovery by appellee in nowise depends on what he said about the mule to others than to appellant's employees or what any such other person may have said to him. On the other hand, if the mule did not act up or if it was fit for the purposes for which it was to be used, no amount of complaints by appellee or remarks by third persons could affix liability on appellant.

By admitting the evidence over objection, the Court necessarily informed the jury that it had materiality, that is, that it tended to prove some fact in issue. Whether or not appellee and Mr. Boles had a conversation before reaching Indian Gardens was not a fact in issue. Therefore, the jury must have concluded that the evidence of these conversations tended to prove something beyond the mere fact of the conversations having taken place. The only thing which they could possibly conclude that the conversation tended to prove was that the mule had acted up even before it reached Indian Gardens. The jury must have understood the ruling of the Court to mean that in

arriving at their verdict upon the issues submitted to them, and if they found the conversations to have taken place, then they were to give weight to them as tending to establish the conduct of the mule on its way down the trail.

It cannot be determined what weight the jury, as a practical matter, did give to this testimony in reaching its conclusion on the controverted point as to the conduct of the mule prior to the accident. In view of the fact that the hearsay evidence and self-serving declarations thus admitted in evidence over appellant's objection bore directly on this controverted fact, one of the main issues in this case, the error in admitting the evidence must be considered prejudicial.

Nishi v. Inoguchi, 116 Cal. App. 398, 401-403, 2 P. (2d) 864;

Davis v. Robinson, 50 Cal. App. (2d) 700, 705, 125 P. (2d) 572.

VI.

Prejudicial Error in Instructing the Jury That Appellee Did Not Assume Risk Occasioned by Negligence on the Part of Appellant.

Over the objection of defendant [287-292], the Court instructed the jury as follows [300]:

> "The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

This is an instruction to the effect that even though appellee may have known that appellant was negligent in furnishing him a mule which was unfit to be ridden by him upon the excursion, nevertheless, as a matter of law, appellee did not assume the risk of riding that mule even after he had an opportunity at Indian Gardens to refuse to continue to do so.

It is a well established rule of law "he who consents to an act is not harmed by it" and that a person who voluntarily continues to participate in a venture after a knowledge of its danger, whether occasioned by the negligence of another or not, cannot recover from an injury resulting from that venture.

Valencia v. San Jose, 21 Cal. App. (2d) 469, 69 P. (2d) 480;

Weiss v. Davis, 28 Cal. App. (2d) 240, 242-243, 82 P. (2d) 487, 488.

In the present case, the very foundation of appellee's claim is that before reaching Indian Gardens he knew that the mule was unsafe and that he was unable to handle it. According to appellee's theory, he protested when at Indian Gardens. Appellee does not claim that the guide then told him that the mule was safe and convinced him against his better judgment that he should continue to ride the mule. All he claims is that after having protested and told the guide that he could not handle the mule, the guide directed him to remount the mule and that he did so.

We submit that it is at least a question of fact to be determined by the jury whether or not plaintiff's conduct in so remounting the mule and continuing to ride him amounted to an assumption of risk; that appellant's requested instruction No. 27 which was refused by the Court [40] correctly states the law; and that the giving of the instruction actually given by the trial court constitutes reversible error.

VII.

Conclusion.

Wherefore, it is respectfully submitted that the trial court committed reversible error, both in the admission of the testimony of the conversations had by appellee outside the preesnce of hearing of any employee of appellant, and also in instructing the jury that as a matter of law appellee had not assumed the risk of continuing to ride that mule even if it had been negligence upon the part of appellant to have furnished him with that mule.

It is, therefore, respectfully submitted that the judgment in this case should be reversed.

Respectfully submitted,

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